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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-119

JACK L. PICKENS

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Walworth County Court, Branch II, is unreported. Although an order of that court is printed at pages 4-5 of the petitioner's appendix, that order is not the order that was appealed to the Wisconsin Supreme Court. The opinion of the Wisconsin Supreme Court, dismissing the appeal from the Walworth County Court's order, is printed in petitioner's appendix, page 3. The opinion of the Wisconsin Supreme Court, denying the motion for reconsideration of its order dismissing the appeal, is printed in petitioner's appendix, pages 1-2.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. sec. 1257. Although petitioner has not cited the subsection of the statute under which he brings this action, it is apparently brought pursuant to 28 U.S.C. sec. 1257 (3) since it is denominated a "petition for writ of certiorari." However, this Court has no jurisdiction under that statute to review any of the questions alleged to be presented by this case since none of the questions was ever properly presented to or decided by the Wisconsin Supreme Court as a federal question. Rather, each of the questions was disposed of on the basis of state law.

QUESTIONS PRESENTED

The "Questions Presented" section of the petition lists three questions. As indicated, none of the questions is properly before this Court for review for the reasons stated above.

STATUTES INVOLVED

In addition to the constitutional and statutory provisions appearing in the petition (pages 3-5), the following statutes are pertinent to the present case:

Section 59.07 (80), Wis. Stats.:

"(80) BAIL BONDS. The authority of the county board to remit forfeited bond moneys to the bondsmen or their heirs or legal representatives, where such forfeiture arises as a result of failure of a defendant to appear and where such failure to appear is occasioned by a justifiable cause, is hereby confirmed."

Section 270.53 (2), Wis. Stats.:

"(2) Every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order."

Section 274.33, Wis. Stats.:

"274.33 Appealable orders. The following orders when made by the court may be appealed to the supreme court:

"(1) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

"(2) A final order affecting a substantial right:

(a) Made in special proceedings, without regard to whether the proceedings involve new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statutes which created the right, remedy or proceedings. or

(b) Made upon a summary application in an action after judgment.

"(3) When an order grants, refuses, continues or modifies a provisional remedy or grants, refuses, modifies or dissolves an injunction, sets aside or dismisses a writ of attachment, grants a new trial or sustains or overrules a demurrer, decides a question of jurisdiction, grants or denies a motion for stay of proceeding under s. 262.19, determines an issue submitted under s. 263.225, or denies an application for summary judgment, but no order of the circuit court shall be considered appealable which simply reverses or affirms an order of the civil court of Milwaukee county, unless the order of the civil court grants, refuses, continues, modifies or dissolves a provisional remedy or injunction.

"(3m) A party on whose motion a new trial has been ordered may nevertheless appeal from such order for the purpose of reviewing a denial of his motion after verdict for judgment notwithstanding the verdict or to change answers in the verdict.

"(4) Orders made by the court vacating or refusing to set aside orders made at chambers, where an appeal might have been taken in case the order so made at chambers had been made by the court in the first instance. For the purpose of appealing from an order either party may require the order to be entered by the clerk of record."

Section 969.13 (1) and (4), Wis. Stats.:

"969.13 Forfeiture. (1) If the conditions of the bond are not complied with, the court having jurisdiction over the defendant in the criminal action shall enter an order declaring the bail to be forfeited."

"(4) Notice of the order of forfeiture under sub. (1) shall be mailed forthwith by the clerk to the defendant and his sureties at their last addresses. If the defendant does not appear and surrender to the court within 30 days from the date of the forfeiture and within such period he or his sureties do not

satisfy the court that appearance and surrender by the defendant at the time scheduled for his appearance was impossible and without his fault, the court shall upon motion of the district attorney enter judgment for the state against the defendant and any surety for the amount of the bail and costs of the court proceeding. Proceeds of the judgment shall be paid to the county treasurer. The motion and such notice of motion as the court prescribes may be served on the clerk who shall forthwith mail copies to the defendant and his sureties at their last addresses."

STATEMENT OF CASE

Petitioner filed a notice of appeal with the Walworth County Court on May 13, 1975. The notice stated that the appeal was taken from "the Order entered in the above entitled action on the 28th day of April, 1975, by the HONORABLE JOHN J. BYRNES, County Judge, Walworth County, Branch II, Elkhorn, Wisconsin" (R. 420). A search of the record discloses, however, that no such order was ever entered. The county court did enter a written order forfeiting petitioner's bail on March 17, 1975. That order was never appealed to a higher court. Although the record shows that the county court, on April 28, 1975, orally denied several motions of the petitioner, these oral orders were never reduced to writing. Thus, when petitioner filed his brief on appeal to the Wisconsin Supreme Court, the State responded by filing a motion to dismiss. Two of the grounds in support of the motion were that 1) the orders were nonappealable since they had never been reduced to writing; and 2) each of the orders was, by its very nature, nonappealable under previous decisions of the Wisconsin Supreme Court. The Wisconsin Supreme Court never reached the merits of the issues raised in

the petitioner's brief but instead granted the State's motion to dismiss. In its written order of March 18, 1976, dismissing the appeal, the court specified that the reason for dismissal was that "the order appealed from is not appealable" (petitioner's appendix, page 4).

Since respondent believes that this Court lacks jurisdiction over the instant case since no federal question is involved, there would ordinarily be no need to discuss the facts bearing on the merits of petitioner's claim. Nevertheless, since the "Statement" in petitioner's brief contains several inaccuracies relating to the merits, respondent feels compelled to correct these misstatements.

Petitioner contends that the testimony at the preliminary examination supports the fact that the crime, if it occurred, took place in Illinois rather than in Wisconsin. This statement is patently erroneous. At the preliminary hearing on July 31, 1974, the victim expressly testified that the crime had occurred in Walworth County, Wisconsin (R. 28). She stated that she had returned to the scene the day after the crime with a police detective to show him the spot where the rape had occurred (R. 28). On cross-examination by defense counsel, she consistently repeated the description of the place where the crime had occurred (R. 40, 41, 44, 45). The defense presented no witnesses to refute her testimony and did not argue the point (R. 48). Contrary to petitioner's assertion, the testimony at the preliminary supported the fact that the crime occurred in Wisconsin, not in Illinois.

Petitioner implies that he attempted to employ Arthur Belkind as retained counsel only after Brian Riemer was dismissed as court-appointed counsel on February 15, 1975. In fact, Attorney Belkind was substituted for

Attorney Worth on January 9, 1974 (R. 140). This substitution was the express wish of the petitioner (R. 63). At this time the court admonished petitioner that local counsel would be required to serve with Attorney Belkind, who is from Chicago, Illinois (R. 140).

Despite the substitution of Attorney Belkind as petitioner's counsel, on January 17, 1975, petitioner again appeared without counsel and was given until January 20 to retain an attorney (R. 68-73). On January 20 he was given an additional week for the same purpose (R. 87-98). Petitioner again appeared without counsel on January 27, 28, and 29, and each time was reminded that a trial date would be set on February 3 (R. 81, 106, 145). On February 3, 1975, petitioner again appeared without counsel, at which time the court appointed Brian Riemer as his attorney. Trial was set for March 17 at 9:30 a.m. (R. 120). On February 18, Attorney Riemer was relieved as counsel because of the difficulties he experienced with the petitioner (R. 156-158). The petitioner was again advised of the date and time for trial (R. 154).

Petitioner's statement that local counsel could not be found in time for the trial date of March 17, 1975, is at best suspect. The trial date was set on February 3, 1975 (R. 120), which gave petitioner a month and a half to employ local counsel. Since petitioner appeared on February 3, 1975, without counsel, however, the judge appointed Attorney Riemer to represent him. There is no indication in the record that petitioner made a concerted effort to obtain privately retained local counsel between February 3, 1975, and the March 17 trial date. There is a strong indication in the record that petitioner, prior to his February 3, 1975 appearance, had contacted several potential attorneys but had not selected one due to his

own finickiness (R. 146). Thus, the statement that local counsel could not be found in time for the trial date is rather misleading.

ARGUMENT

Introduction

Although the argument portion of the petition is labelled "Reasons For Granting This Writ," no reasons for granting the writ are actually set forth therein. Instead, the petition repeats all of the arguments on the merits made to the Wisconsin Supreme Court in the petitioner's brief submitted to that court. The only significant difference is that on appeal to the Wisconsin Supreme Court, petitioner framed the issues in terms of the trial court's alleged abuse of discretion and never mentioned the Fourteenth Amendment to the United States Constitution. Although the petitioner inappropriately argues the merits of this case, the response will be limited primarily to stating why this Court should not grant the petition.

Rule 19 of the Supreme Court Rules sets forth the considerations governing review on certiorari. It indicates that, subject to its discretion, this Court will review the decision of the highest court of a state only when that court has decided a federal question of substance not previously decided by it or which was decided by the state court in a way probably inconsistent with applicable decisions of this Court.

The instant case does not fall within this description. Here, each of the questions raised was not even considered by the Wisconsin Supreme Court since that court dismissed petitioner's appeal on state

procedural grounds. Furthermore, in his brief to the Wisconsin Supreme Court, petitioner based his claims of trial court error not on alleged violation of Fourteenth Amendment rights, but rather on alleged abuse of the trial court's discretion.

**This Court Has No Jurisdiction
To Review The Judgment Of The
Wisconsin Supreme Court Which
Considered And Decided Only
Questions Of State Law.**

The jurisdiction of this Court to review by writ of certiorari the final judgment of the highest court of a state appears in 28 U.S.C. sec. 1257 (3), which provides that such review is appropriate where:

"... the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Although the petitioner attempts to bring this case within the purview of the above statute, it is clear that no federal question was properly presented to or decided by the Wisconsin Supreme Court.

A. The Wisconsin Supreme Court was never properly presented with the question of whether the trial court denied petitioner due process under the Fourteenth Amendment by ordering the forfeiture of his bail bond and by denying its reinstatement.

Before the Wisconsin Supreme Court, the petitioner attempted to appeal the trial court's order decreeing the forfeiture of his bail bond and the trial court's order denying his request for reinstatement of the bond. Although petitioner's brief to the Wisconsin Supreme Court stated that the appeal was from an order of the Walworth County Court, entered March 17, 1975, forfeiting petitioner's bail bond, the notice of appeal which he filed claimed the appeal was taken from an order "entered" April 28, 1975 (R. 420). A search of the record reveals that no order was entered that day, but that a hearing was held on August 28, 1975, during which the court orally denied several motions of the petitioner, including those referred to in the notice of appeal (R. 423-473). One of these motions requested the trial court to reinstate petitioner's bail.

On February 20, 1976, the State moved to dismiss the appeal on three grounds, the first two of which were based on nonappealability of the trial court's order. On March 18, 1976, the Wisconsin Supreme Court granted the motion, stating that "the order appealed from is not appealable" (petitioner's appendix, page 3).

Although the Wisconsin court's order did not specify whether the lower court's order was nonappealable

because not reduced to writing or whether it was nonappealable because of its very nature, both grounds having been raised in the State's motion to dismiss, it is obvious that no federal question relating to forfeiture of the petitioner's bail was properly presented to or decided by the Wisconsin Supreme Court.

First, the petitioner could not have appealed the April 28, 1975, order of the county court since the order was not reduced to writing. (See generally sec. 270.53 (2), Wis. Stats., for the definition of an order, which indicates that reduction to writing is essential.) The well established rule in Wisconsin is that the order from which an appeal is taken must be reduced to writing. *State v. Powell* (1975), 70 Wis. 2d 220, 222, 234 N.W. 2d 345. Second, even if there had been a written order from which to appeal, petitioner would not be entitled to review since an order forfeiting bail is not appealable to a higher court. Section 59.07 (80), Wis. Stats., authorizes the county board to remit forfeited money when it has been forfeited for failure of the defendant to appear, but such failure is occasioned by a justifiable cause. Since the petitioner has not availed himself of the method of review which the legislature has prescribed, it cannot be said that he was properly presented the forfeiture of bail issue to the state's highest court.

Third, the petitioner has arguably even failed to present the bail issue to the Wisconsin Supreme Court in the form of a federal question. In his brief on appeal, petitioner merely referred to the trial court's "abuse of discretion" in the argument headings relating to the bond forfeiture ordered by the trial court. Not even passing reference to the Fourteenth Amendment appears in the petitioner's brief. Petitioner's only allegation that the trial court denied him due process in revoking his

bail appears at page 7 of his brief to the Wisconsin Supreme Court:

"... The right to reasonable bail is based on the presumption of innocence and the right of personal liberty. Any denial or revocation thereof must meet the test of due process. ... The Trial Court, by the complete disregard for obtaining the person of the defendant, other than by a bench warrant, did not accord him his due process rights."

It is extremely doubtful whether the mere reference to "due process" is sufficient to raise a federal question for certiorari review. *Bowe v. Scott* (1914), 233 U.S. 658, 664-5, 34 S.Ct. 769, 58 L.Ed. 1141. This is particularly so where the state constitution has a due process clause (Wis. Const., Art. I, sec. 8), in which case a claim that "due process" has been violated will be deemed to relate to the state constitutional provision. *Bowe* at 664-5.

The foregoing argument demonstrates that, insofar as the first issue raised by petitioner is concerned, no federal question was ever properly presented to or decided by the highest court of the state. Since the Wisconsin Supreme Court dismissed petitioner's appeal solely on state grounds, this Court has no jurisdiction to review that court's decision. *Brinkerhoff-Faris Trust & Co. v. Hill* (1930), 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107. As this Court wrote in *Durley v. Mayo* (1956), 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178:

" 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman v Hanan*, 300 US 14, 18; *Lynch v New York*, 293 US 52. ***' "

B. The Wisconsin Supreme Court was never properly presented with the question of whether the trial court deprived the petitioner of due process under the Fourteenth Amendment by refusing his request for a change of venue.

On appeal to the Wisconsin Supreme Court the petitioner also sought review of the trial court's denial of his motion for change of venue. On motion of the State, the Wisconsin Supreme Court dismissed the appeal on the ground that the order appealed from was not appealable. It is obvious that the court's decision on the change of venue issue rested solely on state grounds.

First, there was no written order denying the motion for change of venue. In his petition to this Court, petitioner makes no pretense that such an order ever existed. The only county court order which petitioner claims to have appealed from dealt with the forfeiture of petitioner's bail. Since the rule in Wisconsin is that appeals will lie only from written orders, *Powell, supra*, the decision of the Wisconsin Supreme Court on the change of venue issue rested only on state law grounds, and this Court has no jurisdiction to review the order by a writ of certiorari. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra*.

Second, even if there had been a written order denying the motion for change of venue, the rule in Wisconsin is that an order refusing a motion for change of venue is not an appealable order under sec. 274.33, Wis. Stats., which prescribes which orders are appealable to the Wisconsin Supreme Court. *Trossen v.*

Burckhardt (1960), 9 Wis. 2d 304, 305, 100 N.W. 2d 918. Thus, the Wisconsin Supreme Court's decision also rested on an interpretation of state statute and did not decide a federal question.

In addition to the fact that petitioner attempted to appeal a nonappealable order to the Wisconsin Supreme Court, instead of waiting until a judgment was reached in the action, at which time he could also appeal denial of his motion for change of venue, it is also questionable whether the petitioner ever framed the change of venue issue as a federal question before the Wisconsin Supreme Court. In his brief to that court, the petitioner never once cited the Sixth or Fourteenth Amendments to the United States Constitution; instead, he relied almost exclusively on Wisconsin cases to show that the trial court abused its discretion in denying the motion for change of venue. The closest the petitioner came to raising a federal question was his invocation of this Court's decision in *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600. It is doubtful that this was sufficient to raise a federal question with respect to the change of venue issue.

The foregoing argument demonstrates that the petitioner never properly presented the change of venue issue to the Wisconsin Supreme Court in that he attempted to appeal from a nonappealable order and in that he failed to frame the issue as a federal question. Consequently, the Wisconsin Supreme Court dismissed the petitioner's appeal solely on state law grounds and never decided a federal question. Therefore, this Court lacks jurisdiction to review the change of venue issue by writ of certiorari.

- C. *The issue of whether the trial court erred in denying the petitioner's motion to dismiss for alleged lack of jurisdiction is not a federal question and was neither properly presented to nor decided by the state's highest court as a federal question.*

The third issue raised by the petitioner is whether the trial court abused its discretion in denying his motion to dismiss for alleged lack of jurisdiction pursuant to sec. 939.03 (1) (a), Wis. Stats. Although petitioner, in the "Questions Presented" section of his petition, ostensibly frames the issue as one involving due process rights under the Fourteenth Amendment to the United States Constitution, it is apparent that the issue is only one of state law. In the argument section of his petition, petitioner contends only that the trial court abused its discretion in denying his motion to dismiss for lack of jurisdiction. The claim rests entirely on a state statute and is not premised on any federal right.

Similarly, before the Wisconsin Supreme Court, the jurisdictional issue was framed only as a question of state law. Even if the issue had been framed as a federal question, however, the issue was not properly presented to the state's highest court.

First, the trial court's denial of the motion to dismiss was never reduced to writing and was therefore not appealable to a higher court. See sections A and B of this brief and *State v. Powell, supra*. Second, even if the trial court's denial of the motion had been reduced to a written order, that order would not have been

appealable prior to entry of judgment in the case. On appeal, the petitioner argued that the courts of Wisconsin lack jurisdiction over petitioner since it was not established at the preliminary examination, to the required degree of certainty, that the crime occurred in Wisconsin rather than in the neighboring state of Illinois. What is challenged in fact is the sufficiency of the evidence presented at the preliminary and the magistrate's order binding petitioner over to the circuit court for trial. The law in Wisconsin is that an appeal does not lie from an order of a magistrate binding over the accused to a court of record. *State ex rel. Klinkiewicz v. Duffy* (1967), 35 Wis. 2d 369, 376, 151 N.W. 2d 63. Nor is an order of the trial court, which refuses to dismiss charges for insufficiency of the evidence at the preliminary, appealable. *State ex rel. Offerdahl v. State* (1962), 17 Wis. 2d 334, 336, 116 N.W. 2d 809. The Wisconsin Supreme Court recognized the nonappealability of the trial court's order denying the motion to dismiss when it dismissed an attempted appeal from that order. Obviously, the Wisconsin Supreme Court based its dismissal solely on the law in Wisconsin and did not decide a federal question in so doing.

For all of the above reasons the third issue presented by petitioner is not properly before this Court since it is not a federal question, despite petitioner's belated attempt to label it as such, and it was neither presented to nor decided by the state's highest court as a federal question. Thus, this Court has no jurisdiction to review the issue by a writ of certiorari. *Durley v. Mayo, supra*.

CONCLUSION

For the reasons heretofore stated, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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